

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

MATTHEW ROBERT DESCAMPS,
Defendant.

No. CR-05-104-FVS

ORDER DENYING NEW TRIAL

THIS MATTER came before the Court on November 20, 2007, based upon the defendant's motion for a new trial. He was represented by Jeffrey S. Niesen; the government by Assistant United States Attorney Stephanie Whitaker.

BACKGROUND

The defendant moves for a new trial. He is entitled to one "if the interest of justice so requires." Fed.R.Crim.P. 33(a).

RULING

The defendant argues that he was never arrested on a federal charge. He is incorrect. A Magistrate Judge issued an arrest warrant on April 29, 2005. On May 5, 2005, the United States Marshals Service filed a "Return" indicating that the arrest warrant had been executed.

The defendant argues that the government improperly charged possession of a firearm and possession of ammunition in a single count. He is incorrect. The government was obligated to bring both

1 allegations in a single count. *United States v. Keen*, 104 F.3d 1111,
2 1112, 1120 (9th Cir.1997) (government should have charged a single
3 violation of 18 U.S.C. § 922(g) where officers found a sawed-off
4 shotgun and several rounds ammunition in a hotel room).

5 The defendant argues that the Court improperly admitted his
6 confession into evidence. He is incorrect. As the Court explained in
7 its prior findings, conclusions, and orders, the manner in which the
8 government obtained his incriminating statements did not violate the
9 Sixth Amendment, the Fifth Amendment, or *Miranda v. Arizona*, 384 U.S.
10 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

11 The defendant argues that the Court improperly denied his motion
12 to restrict the scope of the government's cross-examination in the
13 event he testified. He is incorrect. The Court was well aware of the
14 defendant's predicament. If he took the stand, he could not "refuse
15 to answer questions regarding unprivileged matters reasonably related
16 to his direct testimony." *United States v. Panza*, 612 F.2d 432, 438
17 (9th Cir.1980). For this reason, the decision to testify or refrain
18 from testifying was "a very difficult one." *Id.* The defendant's
19 attorney made a proffer concerning his client's anticipated testimony.
20 The Court carefully considered it. Nevertheless, being well
21 acquainted with the defendant's unpredictability, the Court could not
22 be sure what he would say if, and when, he testified. *Cf. Luce v.*
23 *United States*, 469 U.S. 38, 41, 105 S.Ct. 460, 463, 83 L.Ed.2d 443
24 (1984) (a ruling in limine "is subject to change when the case
25 unfolds, particularly if the actual testimony differs from what was
26

1 contained in the defendant's proffer"). Given the uncertainty, the
2 Court attempted to strike a reasonable balance between the competing
3 interests. *Cf. Panza*, 612 F.2d at 438 ("[a]ccommodating conflicts
4 between the defendant's interest in testifying and the need to insure
5 truth through cross-examination is one of the trial judge's most
6 important functions").

7 The defendant argues that comments which the Assistant United
8 States Attorney made during her closing argument constitute
9 prosecutorial misconduct. He is incorrect. Not only has he failed to
10 demonstrate that he suffered actual prejudice, but also he has failed
11 to identify a comment that allegedly was improper. See *United States*
12 *v. Aichele*, 941 F.2d 761, 765 (9th Cir.1991) ("To succeed on a motion
13 for a new trial based on prosecutorial misconduct, a defendant must
14 show first that the prosecution engaged in improper conduct and second
15 that it was more probable than not that the prosecutor's conduct
16 materially affected the fairness of the trial." (internal
17 punctuation omitted) (quoting *United States v. Smith*, 893 F.2d 1573,
18 1583 (9th Cir.1990))).

19 The defendant argues that the evidence against him was so weak
20 that the jury's verdict constitutes a miscarriage of justice. He is
21 incorrect. In reviewing the record, the Court has kept in mind that
22 its authority to grant a new trial is broader than its authority to
23 grant judgment of acquittal. Not only is the Court "free to weigh the
24 evidence and evaluate for itself the credibility of the witnesses,"
25 *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir.2000), but
26

1 also the Court may grant a new trial if it ``concludes that, despite
2 the abstract sufficiency of the evidence to sustain the verdict, the
3 evidence preponderates sufficiently heavily against the verdict that a
4 serious miscarriage of justice may have occurred[.]’” *Id.* (quoting
5 *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir.1980)). This
6 is not such a case. At trial, the government presented both direct
7 evidence (e.g., the eye-witness testimony of Kenneth Conners and the
8 defendant’s confession) and circumstantial evidence (e.g., the
9 testimony of Detective Brad Manke) that the defendant knowingly
10 possessed a firearm which had been shipped in interstate commerce
11 despite the fact that he previously had been convicted of a felony.
12 The evidence against the defendant was not merely sufficient, but
13 overwhelming.
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15 **IT IS HEREBY ORDERED:**

16 1. The defendant’s motion for a new trial (**Ct. Rec. 357**) is
17 denied.

18 2. The defendant’s objection (**Ct. Rec. 383**) is overruled.

19 **IT IS SO ORDERED.** The District Court Executive is hereby
20 directed to enter this order and furnish copies to counsel.

21 **DATED** this 21st day of November, 2007.

22 s/Fred Van Sickle
23 Fred Van Sickle
24 United States District Judge
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